80-2011

No.

Office-Supreme Court, U.S.
FILED
MAY 29 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL A. BUBLICH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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QUESTIONS PRESENTED

1. Whether Petitioner was denied the effective assistance of counsel in presentation of his insanity defense where defense counsel failed to offer any evidence directly relating to Petitioner's insanity at the time of the alleged offense and failed to offer specific evidence of Petitioner's history of mental illness.

2. Whether, notwithstanding the incompetence of counsel in failing to offer available evidence on the issue of Petitioner's insanity, the Illinois Appellate Court erred in concluding that the evidence was insufficient to raise a reasonable doubt of Petitioner's sanity at the time of the offense.

3. Whether Petitioner's rights to a trial and to due process of law were violated by the action of the trial court in increasing Petitioner's sentence based on evidence of an unrelated pending charge which was subsequently dismissed.

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In the Supreme Court of the United States

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DANIEL A. BUBLICH,

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VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner Daniel A. Bublich prays that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, First District.

OPINION BELOW

The unpublished opinion of the Appellate Court of Illinois, First District, is appended to this petition as Appendix A. The order denying Petitioner leave to appeal to the Supreme Court of Illinois is likewise appended to this Petition as Appendix B.

JURISDICTION

The opinion and judgment of the Appellate Court of Illinois, First District, was entered on November 20, 1980. The Supreme Court of Illinois denied a timely filed Petition for Leave to Appeal on March 30, 1981. The instant Petition for Writ of Certiorari is filed within sixty (60) days of said denial of the Supreme Court of Illinois. The jurisdiction of this court is invoked pursuant to Title 28, U.S.C., Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 3-2 (affirmative defense) of Chapter 38, Illinois Revised Statutes, provides:

> "(a) 'Affirmative defense' means that unless the State's evidence raises the issue involving the alleged

defense, the defendant, to raise the issue, must present some evidence thereon.

"(b) If the issue involved in an affirmative defense is raised then the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense."

Section 6-2 (insanity) of Chapter 38, Illinois Revised Statutes, provides:

"(a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

"(b) The terms 'mental disease or mental defect' do not include an abnormality manifested only be repeated criminal or otherwise antisocial conduct."

Section 6-4 (affirmative defense) of Chapter 38, Illinois Revised Statutes, provides:

"A defense based upon any of the provisions of Article 6 is an affirmative defense."

STATEMENT OF THE CASE

Following a bench trial, the Petitioner, Daniel A. Bublich, was convicted of two counts of rape and one count of deviate sexual assault in violation of Illinois Revised Statutes, Chapter 38, Sec. 11-1 and 11-3. The facts and circumstances relating to the commission of the offense are adequately set forth in the opinion of the Illinois Appellate Court, attached hereto as Appendix A. The facts material to the consideration of the questions presented herein include evidence that Petitioner was insane at the time of the incident, and evidence that the trial court im-

properly increased Petitioner's sentence to include a penalty for unrelated, pending charges against Petitioner which were subsequently dismissed. These facts, briefly, are as follows.

At the trial of this cause, defense counsel attempted to raise the affirmative defense of insanity. In support of this defense, the defendant's mother, Romaine Bublich, testified that in May 1970, when Petitioner was 12 years old, he was involved in a minibike-automobile accident. As a result of this accident, he was taken to St. Margaret's Hospital and was unconscious for four days. Mrs. Bublich further testified that Petitioner was treated by a neurologist and brain scans were taken. Before the accident, he was a normal boy, but she noticed a change in his behavior afterwards. He was placed in military schools in a special class for children with behavioral problems. In addition, Mrs. Bublich testified that Petitioner was treated and examined by several psychologists and psychiatrists and was also hospitalized for treatment.

In addition to the testimony of Mrs. Bublich, three exhibits were admitted into evidence by way of stipulation. Defendant's Exhibit No. 1 was a letter dated February 13, 1976, with accompanying reports from Dr. Robert A. Reifman of the Psychiatric Institute of the Circuit Court of Cook County. In this letter, Dr. Reifman stated that on the basis of his examination conducted on February 13, 1976, four months after the date of the offense alleged in the Information, the defendant was not mentally fit to stand trial "because of a mental condition, specifically psychosis associated with brain trauma and damage." Dr. Reifman's psychiatric summary accompanying the letter stated that the defendant gets confused easily, admits to hearing voices that criticize him, has poor impulse control, becomes easily frustrated and enraged, shows a deficit in

abstract thinking, gets paranoid easily; and since his accident in 1970, he has displayed a behavior change and personality deterioration. The psychosocial history attached to Dr. Reifman's letter stated that the defendant suffered a cerebral concussion as a result of his accident, he has complained of frequent headaches, his EEG was abnormal while his brain scan was normal, and he "may be having some minimal seizures (sudden severe headaches)." The history further stated that the defendant "does have some organic and intellectual limitations due to the head trauma in 1970," and that after the incident, "he experienced the organic symptomatology (agitation, poor memory and concentration, decreased academic ability and headaches, etc.) which resulted in adjustment problems to authority, ridicule by peers, inability to compete or relate to peers and resentment at demands to control behavior and gravitations to those who paid attention to him. . . ."

Defendant's Exhibit No. 2 was a letter from Dr. E. J. Kelleher dated May 28, 1976 to the effect that the defendant remained unfit to stand trial. In the psychiatric summary accompanying the letter Dr. Kelleher's diagnosis was "organic brain syndrome due to trauma, must rule out schizo-affective schoziphrenia, excited type."

Defendant's Exhibit No. 3 was a letter from Dr. Reifman dated December 27, 1976, to the effect that the defendant was not mentally fit to stand trial because of a "mental condition specifically; organic brain syndrome associated with psychosis."

At the Defendant's sentencing hearing; the trial court permitted John Hammond, a police officer of Calumet City, to testify over the objection of defense counsel concerning an arrest of the defendant which occurred on December 28, 1976, which was the subject of another indictment pending against the defendant, *People* v. *Daniel Bublich,*

No. 77 C 571. Specifically, Officer Hammond testified that he attempted to arrest Daniel Bublich for theft of a television set but Mr. Bublich struck him in the face and escaped.

On May 15, 1979, Case No. 77 C 571 was dismissed on the State's motion. At that time, the following colloquy took place:

> THE COURT: This is the matter of Daniel Bublich, 77 C 571, charging burglary and aggravated battery back before the court.
>
> MR. GARZA: Your Honor, as much as the evidence which underlies this indictment was used in an aggravation hearing in 76-I-6-010, and the defendant was sentenced eight to twenty-four years, the People choose not to prosecute the case. Motion state nolle pros.
>
> MR. ROTENBERG: We have no objection, of course, Judge.
>
> THE COURT: All right. For the record, inasmuch as evidence of the offense for which the defendant was indicted in this indictment and offense taking place on December 20, 1976; this court heard considerable evidence in aggravation on information 76-I-6-010 by virtue of aggravation, the sentence was imposed in 76-I-6-010 greater than it would have been without aggravation. The court commends the State on its fairness and inasmuch as that evidence was already in effect used, the State's nolle is entered and the matter is nolle pros'd.

The judgment and sentence of the trial court were upheld November 20, 1980, in an opinion by the Illinois Appellate Court, First District. A timely petition for rehearing was denied by said court on January 8, 1981. A timely petition for leave to appeal was denied by the Illinois Supreme Court on March 30, 1981. The instant Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN PRESENTATION OF HIS INSANITY DEFENSE WHERE DEFENSE COUNSEL FAILED TO OFFER ANY EVIDENCE DIRECTLY RELATING TO PETITIONER'S INSANITY AT THE TIME OF THE ALLEGED OFFENSE AND FAILED TO OFFER SPECIFIC EVIDENCE OF PETITIONER'S HISTORY OF MENTAL ILLNESS.

At trial, Petitioner's retained counsel, Francis William Golden, relied on two theories of defense: first, that the State failed to prove the offenses charged beyond a reasonable doubt; and second, that the State failed to prove Petitioner sane at the time of the offenses charged. On Petitioner's appeal from his conviction, the Illinois Appellate Court held, with respect to the insanity defense, that the trial court could have properly concluded that Defendant's evidence failed to overcome the presumption of sanity. Review of the facts in the present case and the law regarding the insanity defense plainly shows that Petitioner's failure to overcome the presumption of sanity was a result of the incompetence of his counsel. The failure of Petitioner's counsel to offer sufficient, available evidence on the insanity issue denied Petitioner the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

Illinois law provides that the defense of insanity is an affirmative defense and to raise the defense, a defendant must offer sufficient evidence of his insanity at the time

of the offense to establish a reasonable doubt of the defendant's sanity. Illinois Revised Statutes, Chapter 38, Sections 3-2, 6-2, 6-4; *People* v. *Redmond,* 59 Ill.2d 328, 320 N.E.2d 321, 325-326 (1974). Once the defendant has offered sufficient evidence to establish a reasonable doubt of sanity, the State is required to prove the defendant's sanity beyond a reasonable doubt.

A defendant's mental condition may be proved by circumstantial evidence or by the testimony of expert and lay witnesses tending to show that the defendant was insane at the time of the conduct charged. LaFave and Scott, Criminal Law (1972) at 312-315. It is common to require that the witnesses precede or accompany any opinion as to the defendant's sanity with a statement of the facts and circumstances upon which it is founded. *Id.* at 314. The quality and quantity of evidence required to shift the burden of proof to the State on the sanity issue is suggested by the following cases. In *People* v. *Lechner,* 35 Ill.App.3d 1033, 342 N.E.2d 820 (1st Dist., 1976), the court held the testimony of four witnesses, including a psychiatrist and a physician, was sufficient to raise a reasonable doubt of Defendant's sanity. In particular, the physician testified that in his opinion defendant was "mentally disturbed" prior to the crime charged, and the psychiatrist testified that in his opinion a hypothetical man predicated upon the facts of the case would be unable to conform his conduct to the requirements of the law. In *People* v. *Rea,* 47 Ill.App.3d 353, 362 N.E.2d 1 (5th Dist. 1977), the court held the testimony of seven witnesses, including a psychiatrist and a psychologist, was sufficient to raise a reasonable doubt of defendant's sanity. The psychiatrist testified that to a medical certainty the defendant was suffering from a mental disease at the time of the alleged offense. In *People* v. *Lono,* 11 Ill.App.3d 443, 297 N.E.2d 349 (1st Dist., 1973), the court held the testimony of the defendant

and four members of his family was sufficient. And see *People* v. *Childs*, 51 Ill.2d 247, 281 N.E.2d 631 (1972); *People* v. *Munroe*, 15 Ill.2d 91, 154 N.E.2d 225 (1958); *People* v. *Skeoch*, 408 Ill. 276, 96 N.E.2d 473 (1951).

In the instant case, the defense offered four pieces of evidence to establish a reasonable doubt of Defendant Bublich's sanity: the testimony of Defendant's mother, Romaine Bublich, and three exhibits admitted by way of stipulation to the effect that Petitioner was unfit to stand trial. The insufficiency of this evidence to shift the burden of proof to the State is indicated by the Illinois Appellate Court as follows:

> "In the instant case, the testimony of the defendant's mother indicated only that he suffered injuries to his head at the age of 12. He was subsequently tested and examined by a neurologist, but she was not informed of the results of the test. Defendant was then sent to 2 military academies and a special class for people with behavioral problems. Thereafter, he was enrolled in vocational training programs. In addition, she testified that defendant had on several occasions seen 2 or 3 psychiatrists. No dates were given for the defendant's visits to the psychiatrists and no testimony was given as to their findings. Further, no testimony was offered as to the defendant's behavior or condition at the time of the commission of the offense herein. Moreover, the earliest report admitted into evidence from a psychiatrist was the result of an examination of the defendant made 4 months subsequent to the time of the offense." Appendix A at App. 5-6.)

The Appellate Court fails to point out that, in addition to the foregoing deficiencies in the proof, the three stipulated reports that Petitioner was unfit to stand trial have practically no bearing whatever on the issue of insanity. See, for example, *Pate* v. *Robinson*, 383 U.S. 375, 388-390 (1966) (Harlan, dissenting) and *People* v. *Redmond*, 13 Ill.App.3d 604, 300 N.E.2d 786 (1st Dist., 1973).

The deficiencies in the proof on the issue of insanity were plainly the result of counsel's lack of diligence on behalf of Petitioner. The results of the neurologist's tests, mentioned by Mrs. Bublich, could have been ascertained by contacting the neurologist and the hospital in which Petitioner was treated for his head injury. The dates of the visits and the findings of the psychiatrists who Mrs. Bublich testified had seen the defendant, could have been discovered by contacting the psychiatrists or by way of subpoena. Evidence relating to the defendant's behavior or mental condition at the time of the offense easily could have been presented through the testimony of Mrs. Bublich or other witnesses. In addition, the psychiatrists who examined Petitioner prior to trial for purposes of determining his competency, may well have been qualified to offer evidence on the issue of insanity at the time of the offense based solely on the information gathered for purposes of determining competency. If they were not so qualified, they or another psychiatrist might have been so qualified if defense counsel had sought expert testimony prior to trial. In summary, the evidence offered by defense counsel demonstrates a total lack of preparation and investigation with respect to the affirmative defense of insanity.

The circumstances of the present case are very similar to the circumstances in *People* v. *Howard,* 74 Ill.App.3d 138, 392 N.E.2d 775 (3rd Dist., 1979), where the Illinois Appellate Court reversed a conviction for aggravated battery on the ground that defense counsel's failure to discover records of defendant's psychiatric history, which were readily discoverable, deprived the defendant of the effective assistance of counsel. The *Howard* court stated:

> "Of equal significance is the failure to introduce sufficient evidence at the trial to warrant the giving of a jury instruction on the defense of insanity. We

> agree with the trial court that the defendant failed to present sufficient evidence to raise the defense of insanity. The choice to not offer any evidence of this at the trial was one of trial tactics. . . . We acknowledge the rule that matters related to trial tactics are not usually sufficient to establish ineffective assistance of trial counsel. . . . However, in the present case we cannot consider defendant's appointed counsel's trial tactics to be sound where he failed to fully investigate and therefore lacked a full and complete knowledge of his client's case. The record demonstrates that appointed trial counsel otherwise ably presented the defense case in the trial on the merits to the extent of his knowledge of the psychiatric background of his client. Had defense counsel been aware of the Madden Zone Center discharge and its contents, his decision to forego any evidence on the defense of insanity at the trial would likely have been different. The ineffectiveness of counsel which we recognize in this case is defendant's appointed trial counsel's failure to discover the Madden Zone Center report, inadvertently or otherwise, and the resultant inability to use it effectively at both the competency hearings and the trial in chief." 392 N.E.2d at 777-778.

Although defense counsel in *Howard, supra*, was an appointed attorney, and not privately retained, like Mr. Golden in the present case, Petitioner is not therefore entitled to less protection than the defendant in *Howard*. *Cuyler* v. *Sullivan*, 446 U.S. 335, 344 (1980).

As Petitioner Bublich was denied the effective assistance of counsel in the presentation of his insanity defense at trial, his conviction should be reversed.

II.

NOTWITHSTANDING THE INCOMPETENCE OF COUNSEL IN FAILING TO OFFER AVAILABLE EVIDENCE ON THE ISSUE OF PETITIONER'S INSANITY, THE ILLINOIS APPELLATE COURT ERRED IN CONCLUDING THAT THE EVIDENCE WAS INSUFFICIENT TO RAISE A REASONABLE DOUBT OF PETITIONER'S SANITY AT THE TIME OF THE OFFENSE.

The evidence offered by defense counsel to show Petitioner's insanity at the time of the offense included three exhibits by recognized psychiatrists stating that on dates subsequent to Petitioner's arrest and prior to trial Petitioner was not mentally fit to stand trial because of a mental condition, "specifically, psychosis associated with brain trauma and disease"; or "organic brain syndrome due to trauma." Although all three exhibits relate to the question of Petitioner's competency to stand trial, all three agree that Petitioner had a mental defect or disorder deriving from a trauma in 1970. As Petitioner's mental condition after the alleged offense and prior to trial was evidently of a continuing nature, it is a reasonable inference that Petitioner was suffering from a mental disease or defect at the time of the alleged offense. It is equally reasonable to infer that if Petitioner was suffering from a mental disease or defect at the time of the offense, said disease or defect deprived Petitioner of substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Illinois Revised Statutes, Chapter 38, Sec. 6-2 ("insanity").

In light of the foregoing evidence that Petitioner was insane at the time of the offense, the Appellate Court erred in holding that the trial court could have properly concluded that Petitioner's evidence failed to overcome the presumption of sanity.

III.

PETITIONER'S CONSTITUTIONAL RIGHTS TO A TRIAL AND DUE PROCESS OF LAW WERE VIOLATED BY THE ACTION OF THE TRIAL COURT IN INCREASING HIS SENTENCE BASED ON EVIDENCE OF AN UNRELATED PENDING CHARGE WHICH WAS SUBSEQUENTLY DISMISSED.

At the sentencing hearing on the charges in the present case, the trial court, over the objection of defense counsel, heard evidence on an unrelated charge then pending against Petitioner and increased his sentence to account for the unrelated charge. The charge subsequently was dismissed on motion of the State. At that time, the trial court stated:

> "For the record, inasmuch as evidence of the offense for which the defendant was indicted in this indictment and offense taking place on December 20, 1976; this court heard considerable evidence in aggravation on information 76-I-6-010 by virtue of aggravation, the sentence was imposed in 76-I-6-010 greater than it would have been without aggravation.
>
> "The court commends the State on its fairness and inasmuch as that evidence was already in effect used, the State's nolle is entered and the matter is nolle pros'd."

The nonconsensual disposition of the unrelated charge against Petitioner in the instant proceedings violated his rights to a fair trial on the unrelated charge and to due process, and accordingly his sentence should be vacated and the case remanded for sentencing.

The sentencing hearing in the present case involves two distinct but related issues. First, the sentencing raises the issue of what evidence is admissible at sentencing. Second, the sentencing raises the issue of whether it is permissible

to dispose of multiple offenses in a single sentence without the consent of the defendant. The Illinois Appellate Court below failed to distinguish these two issues and erroneously concluded that evidence of the pending charge against Petitioner was merely evidence properly considered at sentencing. Review of all the facts and circumstances make it clear that the action of the trial court was an impermissible disposition of a pending charge in the sentence in the present case.

It is well recognized that in imposing sentence, a trial court may hear and consider evidence not admissible at trial. *Williams* v. *New York*, 337 U.S. 241, 246-47 (1948); *People* v. *Adkins*, 41 Ill.2d 297, 242 N.E.2d 258, 260 (1968). Evidence properly considered at sentencing is restricted to the extent that the information must be accurate and the trial judge "must take care to shield his mind from what might be the prejudicial effect of unreliable and other improper evidence. (See *People* v. *Riley*, 376 Ill. 364, 369, 33 N.E.2d 872, 134 ALR 1261.)" *People* v. *Crews*, 38 Ill.2d 331, 231 N.E.2d 451, 452 (1967). In addition, the evidence must be competent and material. *People* v. *Williamson*, 69 Ill.App.3d 1037, 388 N.E.2d 240, 243 (3rd Dist., 1979); *People* v. *Jackson*, 95 Ill.App.2d 193, 238 N.E.2d 196, 200 (1st Dist., 1968).

As a general rule, evidence of arrests and other encounters with the law not resulting in convictions is incompetent and not admissible at a sentencing hearing. See, for example, *People* v. *Jackson, supra*, 238 N.E.2d at 199. "To hold otherwise would mean a person would be treated as having been convicted of an offense and sentenced therefor without regard to the rights of due process accorded to those charged with criminal offenses." *People* v. *Williamson, supra*, 388 N.E.2d at 243.

Illinois case law draws a distinction between evidence of arrests and evidence of pending charges. Evidence of

pending charges may be admissible in certain circumstances. *People* v. *Poll,* 81 Ill.2d 286, 408 N.E.2d 212, 214 (1980). And see *People* v. *Bey,* 51 Ill.2d 262, 281 N.E.2d 638 (1972), and *People* v. *Jones,* 36 Ill.App.3d 491, 344 N.E.2d 40 (2nd Dist., 1976). In *People* v. *Jones, supra,* for example, the court upheld a sentencing determination following a hearing at which three witnesses testified regarding unrelated battery charges then pending against the defendant over the objection of his counsel. The court affirmed on the ground that "the evidence gave a full presentation of facts surrounding defendant's conduct and related to his potential for rehabilitation. The evidence was not incompetent as rank hearsay: the victims of defendant's assaults were present to be confronted and cross-examined by defendant. In addition, the trial judge stated that he was not passing judgment on defendant's guilt or innocence in the pending charges." 344 N.E.2d at 42. Most recently, in *People* v. *Poll,* 81 Ill.2d 286, 408 N.E. 2d 212 (1980), the Illinois Supreme Court held that under the facts and circumstances in that case, the trial court did not commit reversible error in admitting at sentencing without the defendant's consent the testimony of three witnesses, an oral statement of defendant, and hacksaw blades, all relating to currently pending charges against the defendant. The court failed to indicate when admission of evidence relating to pending charges would constitute reversible error.

At some point, not specified by Illinois case law, evidence of pending charges admitted for purposes of fashioning an appropriate sentence jeopardizes a defendant's rights to a fair trial and due process on the pending charges. Again, at some point, a sentencing hearing becomes a means of disposition of other offens[illegible]. The importance of finding the proper line between a sentencing

hearing and a single disposition of multiple charges cannot be denied in view of the frequency of dispositions of multiple offenses in a single sentence. As the Illinois Supreme Court stated in *People* v. *Eldredge*, 41 Ill.2d 520, 244 N.E.2d 151 (1969):

> "This practice of 'closing the books' on charges if the facts regarding them are brought to the attention of a sentencing judge in another case is common and known to the bench and bar throughout this country. It is recognized by the American Bar Association's Special Committee on Minimum Standards for the Administration of Criminal Justice in its tentative drafts of Standards Relating to Sentencing Alternatives and Procedures (Par. 5.2a and b) and Pleas of Guilty (Par. 1.2) . . . The benefits to defendant are substantial: The 'slate is wiped clean' upon his release from prison; he avoids interstate detainers against him while imprisoned; and he may benefit from concurrent sentences. There are additional advantages to society in a single disposition of multiple offenses for no meaningful rehabilitation program is feasible when there are unresolved criminal charges pending which may result in unknown periods of future imprisonment." 244 N.E.2d at 154.

The distinction between a sentencing hearing and a single disposition of multiple charges is also important in that a knowing waiver of defendant's constitutional rights is clearly required in a single disposition of multiple charges.

The difference between a sentencing hearing and a single disposition of multiple charges is not clearly recognized in Illinois. In *People* v. *Schleyhahn*, 4 Ill.App.3d 591, 281 N.E.2d 409 (4th Dist., 1972), for example, the court declared "that some acquiescence either by 'stipulation' or failure to object as in *Adkins*, is a precondition to the admission of other offenses qua offenses and for that purpose only, for as we read *Adkins*, other offenses, particularly

of a serious nature, could be characterized as information from which a court should 'shield itself from what might be the prejudicial effect of improper material.' " 281 N.E. 2d at 414. The necessity of defendant's consent, recognized in *Schleyhahn, supra,* is overlooked or ignored in other Illinois cases. See, for example, *People* v. *Jones,* 36 Ill.App.3d 491, 344 N.E.2d 40 (2nd Dist., 1976) and *People* v. *Poll,* 81 Ill.2d 286, 408 N.E.2d 212 (1980).

Although the line between sentencing and disposition of multiple offenses is unclear, review of the facts and circumstances in the present case shows that the trial court crossed that line and imposed a sentence improperly disposing of the pending charge against Petitioner without his consent. At the sentencing hearing in the present case, the trial judge permitted, over defendant's objection, a police officer of Calumet City, John Hammond, to testify concerning the arrest of Petitioner on December 28, 1976, the subject of an indictment then pending against Petitioner, *People* v. *Daniel Bublich,* No. 77 C 571. The trial court stated in response to the objection that he would give the evidence only its "appropriate weight." Officer Hammond proceeded to testify that he had attempted to arrest Petitioner for theft of a television set on December 28, 1976, but that Petitioner had struck him in the face and escaped. The transcript of the proceedings in Cause No. 77 C 571 show that, contrary to giving Officer Hammond's testimony "appropriate weight," the trial judge increased Petitioner's sentence in the present case to include a sentence for the unrelated offense. Specifically, in granting the State's motion to nolle pros Case No. 77 C 571, the court stated that "the sentence was imposed in 76-I-6-010 (the present case) greater than it would have been without aggravation. The court commends the State on its fairness and inasmuch as that evidence was already

in effect used, the State's nolle is entered and the matter is nolle pros'd." The court's comments plainly show that the evidence relating to Cause No. 77 C 571 was improperly considered by the trial court in imposing sentence in the instant case. The action of the trial court constituted a nonconsensual disposition of the pending charges against Petitioner in violation of his rights to a fair trial and due process. Accordingly, Petitioner's sentence should be vacated and the case remanded for sentencing.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be allowed to review the instant decision of the Appellate Court of Illinois, First District.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOURTH DIVISION
NOVEMBER 20, 1980

NO. 79-602

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

DANIEL A. BUBLICH,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable Richard L. Samuels, Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Following a bench trial, the defendant, Daniel A. Bublich, was convicted of 2 counts of rape and one count of deviate sexual assault (Ill. Rev. Stat. 1975, ch. 38, pars. 11-1 and 11-3), and sentenced to a term of 8 to 24 years. Defendant appeals contending that the prosecution failed to prove his sanity beyond a reasonable doubt; that the trial court considered improper evidence against him at his sentencing hearing; and he was not proved guilty beyond a reasonable doubt because the complainant's testi-

mony was uncorroborated, unclear and unconvincing and because the evidence failed to sustain the conviction of rape on the theory of accountability.

Police Officer James Bailey of the Village of Burnham testified that on October 17, 1975, at 11:20 p.m., he responded to a call of suspicious vehicle parked in an alley behind 14017 Calhoun. He saw a white station wagon parked in front of a garage and issued a citation. While this officer was writing the ticket, the defendant came running from a few houses away and asked what he was doing. The officer noticed that defendant was barefoot, sweaty, smelled of urine, and his hair was tousled. A fellow officer pulled up, and upon seeing the defendant said, "I thought I told you to stay out of Burnham." The defendant replied that he just wanted to visit his friends, but the officer told him to get into his car and leave. Officer Bailey followed the defendant and saw him speed through 2 stop signs. He then arrested the defendant and took him to the Calumet City police station. He left when he received a call to investigate a complaint of rape in the 140th block of Calhoun.

The officer then met 2 young girls, who were crying, and he noticed that their clothing was in disarray and that one of them had blood on her ear. The girls took him and some other officers to a garage at 14009 Calhoun, where they said they had been raped. The garage was divided into 2 sections—a storage section and another room which contained messy bed sheets and blankets spotted with blood. He found a part of an earring which matched the part of an earring still in the ear of the girl with the bloody ear. The officer, after a brief conversation, transported the girls and Randy Nichols to the Calumet City police station.

The 15-year-old witness testified that on October 17, 1975, at 10:30 p.m., she and her girlfriend were talking to Miomir Vujisic in front of a grocery store located at 108th

and Ewing in Chicago. The 17-year-old defendant, Randy Nichols and Jeffrey Boyd exited from a white station wagon. They talked briefly to Miomir and then asked the girls if they wanted a ride. The girls agreed upon condition that Miomir go with them. The 2 girls and Miomir entered the car with the 3 young men, and the defendant drove to a deserted wooded area where he instructed Miomir and one of the other men to get out. Togethey they walked a few feet into the woods and talked. The defendant and his companion returned to the car, leaving Miomir in the woods. The girls requested to be let out, but the defendant drove to Burnham where he stopped in an alley behind a garage at 14009 Calhoun.

The girls attempted to leave, but the defendant grabbed the witness by the arm, shoved her toward the garage, and threw her in it. Nichols struggled with the other girl, and after they were all in the garage, Boyd stood guard at the door. The defendant announced that this is a rape, and told the witness to take her clothes off. She refused and the defendant told her he would kill her if she did not. He then tore at her clothing and as she struggled, the defendant hit her in the stomach with such force that she hit her head against the wall. The defendant then took off his pants and shoes and straddled her while slapping her in the face. She pleaded with the defendant to stop, and screamed when he inserted his penis in her vagina. Defendant banged her head on the floor and tore her earlobe by pulling on her earring which pierced her ear. He left her momentarily and then she heard her girlfriend scream. Defendant came back, held her head while she was in a sitting position, and demanded that she suck his penis. When she said no, he choked her and forced it into her mouth. He then slapped her several times, and urinated on her. The defendant laughed, put on his pants, and left

the garage, instructing Boyd not to let the girls go. However, she pleaded with Boyd, and he told her to get dressed. She and her girlfriend fled to a house across the street, and the police were called.

When the police arrived, her girlfriend took them to the garage, but the witness refused to go. The girls were then taken to the Calumet City police station where the witness identified the defendant in a lineup. Thereafter, the girls were taken to a hospital where the witness told the hospital authorities she had been beaten. Several hours later she told her parents that she had also been raped and they brought her back to the police and to the hospital where she was given a sperm test. She stated that she did not mention the rape at the first opportunity because she was embarrassed and frightened.

It was stipulated that if the other young girl involved were to testify she would state that while in the garage, she fought with Nichols, and when she screamed the defendant came over and struck her in the chest. The defendant said that if the girls tried to escape he would kill them as well as his male companion. She would also testify that she was forced to perform an act of oral copulation on Nichols by whom she was raped. When she was taken to the hospital, she told the authorities she had been raped. It was stipulated that Dr. Patel would testify to the presence of spermatozoa in this girl's vagina.

For the defense, the defendant's mother testified that 5½ years prior to this incident the defendant had suffered a serious injury in an accident and remained unconscious for 4 days thereafter. Subsequent thereto the defendant's behavior pattern changed for the worse and he had to receive special rehabilitative training from psychologists, psychiatrists and psychiatric social workers.

Pursuant to stipulation, 3 exhibits were admitted into evidence on behalf of the defendant, all of which were from recognized psychiatrists stating that on dates subsequent to his arrest and prior to trial, the defendant was found not mentally fit to stand trial because of a mental condition, "specifically, psychosis associated with brain trauma and disease"; or "organic brain syndrome due to trauma."

Defendant contends that the prosecution failed to overcome beyond a reasonable doubt his affirmative defense of insanity. All men are presumed to be sane, and in order to raise the issue of insanity, a criminal defendant must present sufficient evidence to raise a reasonable doubt as to his sanity at the time of the offense. (*People* v. *Smothers* (1973), 55 Ill. 2d 172, 302 N.E.2d 324; *People* v. *Redmond* (1974), 59 Ill. 2d 328, 320 N.E.2d 321.) As a general rule, the question of defendant's sanity at the time of the offense is a matter to be determined by the trier of fact, and such finding will not be disturbed unless it is manifestly against the weight of the evidence. *People* v. *Spears* (1978), 63 Ill. App. 3d 510, 380 N.E.2d 423.

In the instant case, the testimony of the defendant's mother indicated only that he suffered injuries to his head at the age of 12. He was subsequently tested and examined by a neurologist, but she was not informed of the results of the tests. Defendant was then sent to 2 military academies and a special class for people with behavioral problems. Thereafter, he was enrolled in vocational training programs. In addition, she testified that defendant had on several occasions seen 2 or 3 psychiatrists. No dates were given for the defendant's visits to the psychiatrists and no testimony was given as to their findings. Further, no testimony was offered as to the defendant's behavior or condition at the time of the commission of the offense herein. Moreover, the earliest report admitted into evi-

dence from a psychiatrist was the result of an examination of the defendant made 4 months subsequent to the time of the offense. The State's evidence concerning the defendant's behavior at the time of the offense shows an abnormality manifested only by antisocial conduct. We therefore hold that the trial court could have properly concluded that defendant's evidence failed to overcome the presumption of sanity.

The defendant next contends that the trial court erred when it admitted and considered evidence of other pending charges against him at his sentencing hearing. Bare arrests which have not resulted in convictions are not admissible at a hearing on aggravation and mitigation. However, evidence of pending indictments may properly be presented to afford the trial judge a fuller knowledge of the defendant's prior conduct so that he may sentence accordingly. (*People* v. *Bey* (1972), 51 Ill. 2d 262, 281 N.E.2d 638; *People* v. *Jones* (1976), 36 Ill. App. 3d 491, 344 N.E. 2d 40.) Here, the defense counsel admitted to the trial judge that the evidence of defendant's prior misconduct at his sentencing hearing was the subject matter of an indictment. The trial judge stated that he would certainly give the matter "only its appropriate weight." We find that the admission of such testimony was within reasonable bounds and did not impermissibly influence the sentence. See *People* v. *Poll* (1980), ... Ill. 2d ....., ... N.E.2d ..... (No. 52534 filed June 30, 1980).

Defendant also contends that the testimony of the prosecuting witness as to rape and deviate sexual assault was neither clear and convincing nor corroborated. He points out that she did not complain of these acts in her initial contact with the police, and that the evidence merely shows that she sustained a beating. In order to sustain a conviction of rape, the testimony of the complaining witness must

be clear and convincing or substantially corroborated by some other facts, evidence, or circumstances. (*People* v. *Sims* (1972), 5 Ill. App. 3d 727, 283 N.E.2d 906; *People* v. *Collins* (1974), 21 Ill. App. 3d 800, 315 N.E.2d 916.) A reviewing court will not disturb a judgment of conviction unless the evidence is so palpably unreasonable, improbable or unsatisfactory as to cause a reasonable doubt of guilt of the accused. *People* v. *Sumner* (1969), 43 Ill. 2d 228, 252 N.E.2d 534; *People* v. *Carroll* (1977), 49 Ill. App. 3d 387, 364 N.E.2d 408.

In the instant case the trial court found the testimony of the prosecuting witness to be clear and convincing, and that for the circumstances, there was a prompt outcry. A medical examination of the prosecuting witness revealed that she suffered multiple bruises and abrasions on her body, neck, ear, and at the entrance to the vaginal vault. Further, the police officer testified that when he first saw the defendant, he was barefoot, disheveled and smelled of urine. In addition, he saw the inside of the garage and viewed the blood-stained sheets and blankets. Her outcry as to the incident first came when she was alone with her parents within hours after the rape had occurred. *People* v. *Sims*.

Finally, defendant contends that the evidence does not sustain the finding of guilt of rape of the other young girl on the theory of accountability. Where 2 or more persons have a common design to accomplish an unlawful purpose, the act of one is the act of all, and all are equally guilty of whatever crime is committed. (*People* v. *Browder* (1974), 21 Ill. App. 3d 223, 315 N.E.2d 168; *People* v. *Jones* (1977), 53 Ill. App. 3d 197, 368 N.E.2d 452.) Here the evidence shows that after the girls were forced into a garage the defendant announced a rape. It was the defendant who ordered Boyd to stand at the garage door to prevent their

escape. The evidence further shows from the stipulated testimony of the second young girl involved in the incident that it was the defendant who struck her in the chest thereby abetting Nichols in committing rape. We do not find that this contention of the defendant has any merit.

The judgment of the circuit court of Cook County is affirmed.

DATED AT CHICAGO, ILLINOIS THIS 20th DAY OF NOVEMBER, 1980.

ENTER:

/s/ *Philip Romiti*
JUSTICE

/s/ *David Linn*
JUSTICE

/s/ *M. R. Jiganti*
JUSTICE

APPENDIX B

54520

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK

Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

March 30, 1981

Mr. Jerome Rotenberg
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7 S. Dearborn St., S#820
Chicago, IL 60603

No. 54520—People State of Illinois, respondent, vs. Daniel A. Bublich, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL A. BUBLICH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Printed by the Authority of the State of Illinois—7-81-55—P.O. 52478

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REASONS FOR DENYING THE WRIT

The petitioner has raised no issue of such stature as to warrant review by this Court.

The petitioner asserts that his trial counsel was incompetent in failing to present evidence adequate to establish a defense of insanity. Alternatively, petitioner asserts that the evidence presented did create a reasonable doubt of sanity at the time of the offense which was never rebutted by the State. Finally, petitioner claims that certain evidence was improperly received at his sentencing hearing.

I.

PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

The first of these claims, that trial counsel was inadequate, was not raised before the Illinois Appellate Court. The basis for this claim appears to be that in not presenting evidence sufficient to raise a defense of insanity, counsel failed to provide the petitioner the appropriate quality of legal assistance. It is alleged that counsel failed to ascertain the results of neurology tests made on petitioner following a head injury he suffered at age 12; that he failed to ascertain the findings of psychiatrists the petitioner had seen following the injury; that he failed to elicit testimony from persons close to petitioner at the time of the crime as to his sanity; and that he failed to elicit testimony from the psychiatrists who made the determination of trial competency as to sanity at the time of the crime. (Pet. Br. pp. 9-10)

It is essential to a meritorious claim of ineffective assistance of counsel that there be some basis for alleging prejudice to the defendant as a result of counsel's shortcomings. *United States* v. *Bad Cob,* 560 F. 2d 877 (8th Cir. 1977); *Bush* v. *United States,* 393 F. 2d 478 (10th Cir. 1968). Here, the record contains no indication that the evidence which was not presented might have been favorable to petitioner. Furthermore, the argument that trial counsel was ineffective because he failed to pursue a particular line of evidence, or failed to call certain witnesses, is not favored by the courts because it involves speculation as to what that evidence might have shown. *Buckelew* v. *United States,* 575 F. 2d 515 (5th Cir. 1978); *United States* v. *Doran,* 564 F. 2d 1176 (5th Cir. 1977), *cert. den.* 435 U. S. 928 (1978). Petitioner asks this Court to speculate, first, that evidence regarding his sanity at the time of the offense existed; second, that trial counsel either failed to

discover it or ignored it;* and third, that the evidence would have been beneficial to his defense. In other words, petitioner has informed this Court that a psychiatric history exists but was not presented in evidence, and asks the Court to speculate upon its substance.

II.

THE EVIDENCE PRESENTED BY PETITIONER WAS NOT SUFFICIENT TO RAISE A REASONABLE DOUBT AS TO HIS SANITY AT THE TIME OF THE OFFENSE.

The Appellate Court properly concluded that the petitioner's evidence failed to raise a bona fide doubt of insanity at the time of the offense. In seeking a review by this Court, petitioner relies on the finding below that he suffered from a mental condition which was present as early as 1970, and which was the basis for the finding that he was incompetent to stand trial. From this, petitioner asserts that it is reasonable to infer that he was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (See Ill. Rev. Stat. ch. 38, Sec. 6-2) This argument falls far short of the mark. Firstly, the issues of insanity at the time of the offense and competency to stand trial are wholly separate and distinct. *Jackson* v. *Indiana,* 406 U. S. 715 (1972). Compare *Drope* v. *Missouri,* 420 U. S. 162 (1975) and Ill. Rev. Stat., ch. 38, Sec. 6-2. Furthermore, the presence of some degree of mental illness is not necessarily dispositive of either issue. *Hall* v. *United States,* 410 F. 2d 653 (4th Cir. 1969). The trial court's finding that petitioner had not raised a reasonable doubt as to his sanity at the time of the offense is a finding of fact which, as the Appellate Court appropriately ruled, should not be disturbed on review. *Glasser* v. *United States,* 315 U. S. 827 (1942).

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* Petitioner alleges that trial counsel failed to ascertain the results of earlier neurology tests and psychiatric examinations. (Pet. Br. p. 10) There is no support for this in the record. Petitioner relies solely on the fact that the evidence was not produced, discounting entirely the possibility that the evidence was discovered and found to be unfavorable.

III.

THE SENTENCING PROCEDURES FOLLOWED IN THIS CASE PRESENTED NO CONSTITUTIONAL VIOLATION

Similarly, the Appellate Court properly found that the trial court was not improperly influenced by its reception at the sentencing hearing of evidence which was the subject matter of a then pending indictment. Trial counsel conceded that the conduct was the basis of a pending charge, and the trial court indicated that it would give the evidence "only its appropriate weight." From the record it is clear that the trial court fully understood the nature of this evidence—that it was simply a pending indictment and not a conviction. The charge was subsequently dismissed by the prosecution because the evidence had been presented in aggravation at this sentencing. The cases cited by petitioner in his brief, as well as the A.B.A. Minimum Standards concerning sentencing alternatives (See pet.'s brief, p. 16) recognize the many benefits to a criminal defendant afforded by this kind of combined disposition. The Petitioner's consent to this disposition of the charge is not required.

CONCLUSION

For the foregoing reasons, the respondent requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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